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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ISAAC ROSARIO,)	
)	
Plaintiff,)	
)	
v.)	No. 06 C 5108
)	
CITY OF CHICAGO, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

During the course of this Court's April 17, 2008 oral ruling on the motion brought by counsel for defendant James Witt ("Witt"), seeking reconsideration of the April 1 written memorandum opinion and order dealing with the litigants' motions in limine, this Court had occasion to refer to another of its opinions, issued almost exactly two decades back, that has since been picked up by a number of other judges, apparently because they like the turn of phrase employed there. Here is that excerpt from Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988):

Despite what Gulfco appears to think, this Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure. Motions such as this reflect a fundamental misunderstanding of the limited appropriateness of motions for reconsideration.

Nothing daunted, Witt's counsel have once again pursued the same course--as the French aphorism has it:

Plus ça change, plus c'est la même chose.

Witt's most recent renewal of his effort to obtain relief as to a portion of the motions in limine has been triggered in connection with this Court's request, made at the conclusion of its April 17 oral ruling, that counsel for plaintiff Isaac Rosario ("Rosario") file a written response as to two issues raised in Witt's motion to consider. That response is now in hand, and Witt's counsel has just tendered a motion for presentment on May 21, asking leave to file a Reply Memorandum. If anything, the parties' most recent submissions reconfirm the appropriateness of one aspect of this Court's earlier orders and identify the need for further input as to a second aspect.

First of the items raised by Witt is the attempted admission of testimony by James Staunton ("Staunton"), the Police Department employee who fingerprinted Rosario on September 26, 2005 (the date of the incident at issue in this litigation) and who generated the computerized arrest report (Ex. 1 to this opinion) containing input from various sources, including (1) Witt as the arresting officer, (2) Witt's approving supervisor, (3) Rosario and (4) Staunton himself. Not to put too fine a point on the matter, Witt's counsel has not fairly characterized the record on that score by urging the admissibility of Staunton's testimony to establish the foundation to bring into the record under Fed. R. Evid. ("Rule") 803(5), often referred to by its common law label of "past recollection

recorded," a statement contained in that arrest report. Some review of the bidding is called for in that respect.

To begin with, after protracted (months-long) efforts by Rosario's counsel to pin down defense counsel (and defendants) to straightforward answers to some key interrogatories seeking information as to any personnel having knowledge of the events at issue in the case, Assistant Corporation Counsel Megan McGrath generated the August 21, 2007 letter attached as Ex. 2. Most critically, after that defense counsel had obtained express confirmation from Staunton as to his responses, that letter made these representations:

3. City personnel who heard plaintiff make statements, or who remember plaintiff making statements on Sept. 26, 2005:

None.

4. City personnel who did not hear plaintiff make statements, or who do not remember hearing plaintiff make statements on Sept. 26, 2005:

Capt. Mark Buslik
Sgt. Brian Orseno
PO Saul Basurto
PO Leah Tobek
Detention Aide James Staunton

So it is undisputed that Staunton cannot testify to any matters of his own knowledge--hence the need to fall back on Rule 803(5).

But at that point Witt's counsel leaves the realm of fact and enters the world of speculation. Here are the telling excerpts from page 2 of Witt's current proposed Reply:

Staunton is an individual who does not remember either observing Rosario or taking his statement.

* * *

Ms. Hoft [Rosario's counsel] handed Yi [Chicago Police Officer Richard Yi, who searched Rosario and explained lockup procedures to him on September 26, 2005] with [sic] a copy of the computerized report relating to Rosario and asked him who inputted the data. Yi told her that Staunton had prepared this report. Yi Deposition 40. Ms. Hoft then asked Yi whether Staunton had included in the report a statement that Rosario had been injured prior to his arrest. Yi testified that he had, although Yi did not know how Staunton acquired this information nor did he remember Rosario's statement to this effect. Id.

It is against that backdrop that this Court must view the statement in the arrest report that is sought to be introduced through Staunton's provision of the foundation for the document--but not a foundation for the statement itself.

As an examination of the arrest report reveals, what it includes in part is a section that specifically reflects Rosario's answers to questions posed by Staunton in the section headed "ARRESTEE QUESTIONAIRE" (sic). But the focus of the current dispute is this entry, found not in that section but later under the caption "QUESTIONNAIRE REMARKS" (copied verbatim):

Arrestee Has Numerous Bruise's About Face Area Right
Cheek Area Injured Prior Too Being Arrested

On Witt's (and the City of Chicago's) own representations, neither Yi nor Staunton has ascribed that statement, or has any first-hand ability to ascribe it, to Rosario. Both Yi and

Staunton disclaim knowledge in that regard. To then characterize that entry as an admission by Rosario, as is essential to qualify it for admissibility as nonhearsay under Rule 801(d)(2), requires sheer speculation.

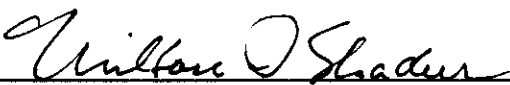
Rule 803(5) frequently poses the problem that cross-examination as to statements contained within such a record is effectively unavailable. Even though a document itself may come within an exception to the hearsay rule, statements within the documents must themselves qualify either as hearsay exceptions or as nonhearsay. And in that regard Rule 403 is always a relevant consideration.

Here the statement at issue, unanchored as it is as being a purported Rosario admission through any testimony from declarant Staunton (or, for that matter, from Yi), is thus hearsay. And even were that not the case, its attenuated character causes it to run afoul of Rule 403 balancing: Any probative value it might have in those speculative terms is indeed substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Accordingly Witt's motion for reconsideration on that subject is denied.

Next Witt asks this Court to take a fresh look at its provisional exclusion of Rosario's cellphone records, offered by Witt to impeach a portion of Rosario's account of events on the night in question. Quite apart from the issues of reliability

and probative value that cause Rosario's counsel to invoke Rule 403 to bar those records, there is a conflict between the parties as to whether the cellular telephone records from Rosario's girlfriend Michelle Muniz' telephone are or are not contradictory of the Rosario cellphone records that Witt seeks to introduce. This is an issue on which resolution can best be derived by a brief in-person presentation by opposing counsel explaining their respective positions. To that end counsel should be prepared, on the May 21 presentment date for Witt's motion, to discuss setting an early date for such in-person presentation and this Court's ruling.

Finally, Witt has accompanied his proposed Reply with a motion seeking leave to amend the existing final pretrial order to add some witnesses relating to his alleged Rule 404(b) conduct. On that score this Court needs a response (of course) from Rosario's counsel, and that subject can also be addressed at the May 21 presentment date.



Milton I. Shadur
Senior United States District Judge

Date: May 15, 2008

CHICAGO POLICE DEPARTMENT
REST REPORT

S. Michigan Avenue, Chicago, Illinois 60653
(For Chicago Police Department Personnel Only)
I. 420C (REV. 6/30)

FINAL APPROVAL

CB #: 16317171
IR #: 1167862
YD #:
SID #: 38256440

Name: ROSARIO, Isaac

Res: 7268 W Thorndale Ave, #5A
Chicago, IL 60631

Beat: 1612

DOB: 29 June 1977

AGE: 28 years

POB: Illinois

DLN: R26040077184 -IL

TID: 26040077184R - ILLINOIS

Male
White Hispanic
6' 00"
270 lbs
Hazel Eyes
Unknown Hair
Bald Hair Style
Light Complexion

Arrest Date: 26 September 2005 01:50 TRR Completed? No

Location: 3156 N Laverne Ave
Chicago, IL 60641
304 - Street

Beat: 2591

Total No Arrested: 1

Co-Arrests

Assoc Cases

DCFS Ward? No

Holding Facility: District 025 Male Lockup

Assisted Arrest? No

Dependent Children? No

Victim

Offense As Cited 725 ILCS 5.0/110-3
ISSUANCE OF WARRANT

Offense As Cited 725 ILCS 5.0/110-3
ISSUANCE OF WARRANT

Offense As Cited 625 ILCS 5.0/6-303-A
DRIVING ON A REVOKED LICENSE
Class A - Type M

Offense As Cited 625 ILCS 5.0/3-707
INSURANCE - OPERATE MTR VEHICLE WITHOUT
Class U -

Offense As Cited 625 ILCS 5.0/12-603.1
IVC - NOT WEARING SEAT BELT/DRIVER
Class P -

Offense As Cited 9-36-030
LIMIT ON OVERTAKING ON THE LEFT
Class L -

Offense As Cited 9-24-010(B)
STOP AT STOP SIGN
Class L -

#1 MTT

ROSARIO, Isaac

NO NARCOTICS RECOVERED

Warrant No	Issue Date	Type	NCIC/ Leads No	Hold	Bond Amount	Case Docket No	County
E001358	31-MAR-00	Bond Forfeiture Warrant			\$3,000.00	T0797472 8	Cook
W05M2771	14-JUN-05	Bond Forfeiture Warrant	W05M2771	L30253			Dupage

Vehicle: VEHICLE IMPOUNDED: No

1987 Truck - Chevrolet - Astro - Vanette, (Metro, Step
Van, Handy Van)

VIN#: 1GBDM1525HB201707

Lic#: 6533168 IL

Color: Maroon Or Burgundy (Top) / Gray (Bottom)

Inv#:

Pound#: 701 N SACRAMENTO

Disposition: Towed

Confiscated Properties :

Confiscated properties are recorded in the e-Track System. This system can be queried by the inventory number to retrieve all official court documents related to evidence and/or recovered properties.

PROPERTIES INFORMATION FOR ROSARIO, Isaac, NOT AVAILABLE IN THE AUTOMATED ARREST SYSTEM.

The facts for probable cause to arrest AND to substantiate the charges include, but are not limited to, the following)

WARRANT #01160 OFFENDER OBSERVED OPERATING ABOVE VEHICLE COMMITTED MINOR TRAFFIC VIOLATIONS AND CURBED. OFFENDER UNABLE TO PRODUCE A DRIVERS LICENSE OR INSURANCE AND PLACED IN CUSTODY FOR TRAFFIC VIOLATION BOND. OFFENDER MIRANDIZED AND TRANSPORTED TO 025 DISTRICT FOR PROCESSING. NAME CHECK OF OFFENDER REVEALED LOCAL WARRANT #TE011358 CONFIRMED BY CENTRAL WARRANTS QUINTANA #5271 FOR CHICAGO AND LEADS WARRANT #W05M2771 CONFIRMED BY LEADS MOSS 13778 HOLD #L30253 FOR SOUTH DUPAGE COUNTY. OFFENDER HAS PHOTO I.D. AND \$459.00 U.S.C.

ROSARIO, Isaac

Desired Court Date: 19 October 2005
Branch: TRFCT50 W WASHINGTON - Room
Court Sgt Handle? No
Initial Court Date: 26 September 2005
Branch: CBC-1 2600 S CALIFORNIA - Room
Docket #:

BOND INFORMATION NOT AVAILABLE

hereby declare and affirm, under penalty of perjury, that the facts stated herein are accurate to the best of my knowledge, information and/or belief.

Attesting Officer: #19400 WITT, J L (PC0S626) 26 SEP 2005 04:17

Arresting Officer: #19400 WITT, J L (PC0S626)

Beat
2521

Approval of Probable Cause : #56 BUSLIK, M S (PC09741) 26 SEP 2005 04:11

Holding Facility: District 025 Male Lockup
Received in Lockup: 26 September 2005 04:35
Prints Taken: 26 September 2005 04:31
Photograph Taken: 26 September 2005 04:34
Released from Lockup: 26 September 2005 09:16

Time Last Fed:

Time Called: 26 September 2005 04:45

Phone#: 6309804499

Cell #: 7-5

Transport Details : 1PO 2521 26-SEP-2005 01:58

Is there obvious pain or injury? Yes
Is there obvious signs of infection? No
Under the influence of alcohol/drugs? No
Signs of alcohol/drug withdrawal? No
Appears to be despondent? No
Appears to be irrational? No
Carrying medication? No

Presently taking medication? No
(If female)are you pregnant? No
First time ever been arrested? No
Attempted suicide/serious harm? No
Serious medical or mental problems? No
Are you receiving treatment? No

Arrestee Has Numerous Bruise'S About Face Area Right Cheek Area Injured Prior Too Being Arrested

Name : MUNOZ, Michele

Res:

Beat:

NO INTERVIEWS LOGGED

NO VISITORS LOGGED

ROSARIO, Isaac

Action	By	Destination	Reason
RELEASED BY	#2099 Orseno, Brian (PC0G354)	26 SEP 2005 05:16 District 025 Male Lockup	
RECEIVED BY	#3519 Tobeck, Leah	26 SEP 2005 05:16 West Suburban	Treatment.
RECEIVED BY	#11660 Basurto, Saul (PC0M959)	26 SEP 2005 07:14 District 025 Male Lockup	Back

Watch Commander Comments:

DOES NOT APPLY TO THIS ARREST

	Beat
Searched By: #18009 YI, R Y (PC0X694)	
Lockup Keeper: #18009 YI, R Y (PC0X694)	
Assisting Arresting Officer: #19034 DROZD, M K (PC0V726)	2523
Assisting Arresting Officer: #5383 THEODORIDES, P G (PC0V196)	2523
Fingerprinted By: STAUNTON, J M (PC0C981)	

	Beat
Final Approval of Charges : #56 BUSLIK, M S(PC09741)	26 SEP 2005 05:11



City of Chicago
Richard M Daley, Mayor

Department of Law

Mara S. Georges
Corporation Counsel

Police Policy Litigation Division
30 North LaSalle Street
Suite 1610
Chicago, Illinois 60602-2580

(312) 744-9010
(312) 744-6912 (PAX)

<http://www.cityofchicago.org>

Via Facsimile Delivery

August 21, 2007

Janine L. Hoff
People's Law Office
1180 North Milwaukee Ave.
Chicago, IL 60622

RE: **Rosario v. City of Chicago, et. al., 06 C.5108**

Dear Counsel,

I hope that you received our letter of August 17, 2007, making your requested changes in the interrogatory answers. After confirming with Detention Aide James Staunton, his answer does not change.

1. City personnel who witnessed any physical interaction between Plaintiff and any members of the Chicago Police Department:
None.
2. City personnel who did not witness any physical interaction between the Plaintiff and any members of the Chicago Police Department:
Capt. Mark Buslik
Sgt. Brian Orseno
PO Saul Basurto
PO Leah Tobek
Detention Aide James Staunton
3. City personnel who heard plaintiff make statements, or who remember plaintiff making statements on Sept. 26, 2005:
None.
4. City personnel who did not hear plaintiff make statements, or who do not remember hearing plaintiff make statements on Sept. 26, 2005:
Capt. Mark Buslik
Sgt. Brian Orseno
PO Saul Basurto
PO Leah Tobek
Detention Aide James Staunton
5. City personnel who observed plaintiff, or who remember any observations of plaintiff, on Sept. 26, 2005:
None.

Rosario Interrogatories letter

Pg. 2

August 21, 2007

6. City personnel who did not observe, or do not remember observing plaintiff on Sept. 26, 2005:
Capt. Mark Buslik
Sgt. Brian Orscho
PO Saul Basurto
PO Leah Tobek
Detention Aide James Staunton

Sincerely,



Megan K. McGrath
Assistant Corporation Counsel
Attorney for Defendant City of Chicago
(312) 742-3541

cc: Mary S. McDonald
Attorney for Defendant Officer Witt